

A **Syarikat Pembinaan Lida Sdn Bhd v Talasco
Insurance Sdn Bhd**

B SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-536-91
GUNN CHIT TUAN CJ (MALAYA), PEH SWEE CHIN AND EDGAR JOSEPH
JR SCJJ
30 MARCH 1993

C *Insurance — Fire insurance — Expiry of policy — Fire occurred before policy was renewed — Cover note issued after date of fire purporting to renew policy retrospectively — Whether policy was good — Whether insurer liable — Whether there was an insurable interest*

Insurance — Duty of disclosure — Duty to disclose material facts up to the date contract was made

- D A fire insurance policy had been issued by the respondent to the appellant to cover damage from fire in respect of a building in the course of construction, building materials and site office. The fire policy expired on 31 December 1981 and was not renewed at or before the time of its expiry. On 9 February 1982, a fire, which was a risk which would have been covered by the earlier policy if it had been
- E validly renewed, occurred, causing some damage to the appellant's building materials and site office. On 10 February 1982, the respondent's branch manager issued a cover note to the appellant purporting to cover retrospectively, the period from 1 January 1982 to 30 June 1982, thus covering the fire and consequential damage in question retrospectively. The appellant was awarded the sum of
- F RM25,000 by the High Court under the fire insurance policy. It appealed against the inadequacy of the sum awarded, while the respondent in turn cross-appealed against the whole of the award on the ground, inter alia, that it should not have been held liable at all.
- G **Held**, dismissing the appellant's appeal and allowing the respondent's cross-appeal:
- H (1) Policies on insurance against fire are made on the implied condition that the description of the property inserted in the policy is true at the time of the making of the policy and where the policy is retrospective, the duty of disclosure applies not only to such facts as were material at the date from which the policy is to take effect, but also to all facts becoming material down to the actual date on which the contract is made. In this case, there was in fact no property to insure at the date of the issue of the cover note which purported to renew the old fire insurance policy.
- I (2) If both parties knew that the subject matter of the policy was lost at the time when they entered into the policy and the policy in terms covers that loss, the policy is good. Nevertheless, it must be clear from the wording of the policy that such was the intention of

the parties; if this cannot be demonstrated, the policy is void and the premium must be returned. In this case, the appellant had failed to establish the basic fact that the wording of the policy afforded cover for the property concerned which was lost after the expiry of the old policy but prior to the issue of the cover note. Therefore, the respondent as the insurer was not liable because the cover note had not attached at all by reason of the fact that at the time of its issue, the risk had determined and there was no insurable interest to insure and the terms of the policy did not cover such a situation.

[Bahasa Malaysia summary

Suatu polisi insurans kebakaran telah dikeluarkan oleh penentang kepada perayu untuk melindungi dari kerugian yang disebabkan oleh kebakaran untuk suatu bangunan yang sedang dibina, bahan-bahan pembinaan dan pejabat tapak pembinaan itu. Insurans kebakaran itu telah tamat tempohnya pada 31 Disember 1981 dan tidak diperbaharui pada atau sebelum tamatnya tempoh itu. Pada 9 Februari 1982, suatu kebakaran, yang merupakan suatu risiko yang akan dilindungi oleh polisi yang terdahulu itu jika ianya dibaharui dengan sah, telah terjadi, menyebabkan kerosakan kepada bahan-bahan pembinaan penentang dan pejabat tapak pembinaan itu. Pada 10 Februari 1982, pengurus cawangan penentang telah memberi suatu nota lindungan kepada perayu yang dikatakan akan memberi perlindungan secara kebelakangan dari 1 Januari 1982 hingga 30 Jun 1982, dan dengan itu melindungi dari kebakaran dan kerugian yang berbangkit itu secara kebelakangan. Perayu telah diawardkan RM2,500 oleh Mahkamah Tinggi di bawah polisi insurans kebakaran itu. Ia telah membuat rayuan kerana jumlah wang yang diberikan itu tidak mencukupi, sedangkan penentang pula membuat rayuan balas terhadap keseluruhan award itu atas alasan, antara lain, bahawa ia tidak seharusnya bertanggung sama sekali.

Diputuskan, menolak rayuan pemohon itu dan membenarkan rayuan balas penentang itu:

- (1) Polisi-polisi insurans terhadap kebakaran dibuat atas syarat tersirat bahawa gambaran harta yang diberi di dalam polisi itu adalah benar pada masa polisi itu dibuat dan di mana polisi itu berkesan secara kebelakangan, tugas penzahiran dikenakan bukan sahaja kepada fakta-fakta yang penting pada tarikh polisi itu mula berkuatkuasa, tetapi juga kepada semua fakta-fakta yang menjadi penting hingga ketarikh yang sebenar kontrak itu dibuat. Di dalam kes ini, sebenarnya tidak ada harta untuk diinsuranskan pada masa pengeluaran nota lindungan yang bertujuan membaharui polisi insurans kebakaran yang lama itu.
- (2) Jika kedua-dua pihak mengetahui bahawa perkara di dalam polisi itu telah musnah pada masa mereka membuat polisi itu dan polisi itu ternyata melindungi kehilangan itu, polisi itu adalah sah. Akan

- A tetapi, mestilah jelas dari perkataan-perkataan di dalam polisi itu bahawa ia merupakan niat pihak-pihak itu; jika ini tidak dapat dibuktikan, polisi itu adalah tidak sah dan bayaran premium hendaklah dikembalikan. Di dalam kes ini, perayu telah gagal membuktikan fakta asas bahawa perkataan-perkataan di dalam
- B polisi itu memberi perlindungan bagi harta yang berkenaan yang telah hilang selepas tamatnya tempoh polisi yang lama tetapi sebelum nota lindungan itu dikeluarkan. Oleh itu, penentang sebagai syarikat insurans tidak bertanggungjawab oleh kerana nota lindungan itu tidak terkena oleh kerana pada masa ia dikeluarkan, risiko itu telah berlaku dan tidak ada kepentingan yang boleh diinsuranskan dan terma-terma polisi itu tidak melindungi keadaan seperti itu.]
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Notes

For cases on fire insurance, see 8 *Mallal's Digest* (4th Ed) paras 22–32.

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Cases referred to

- 1 *Silem v Thornton* (1854) 3 E&B 868 (refd)
- 2 *Bradford v Symondson* (1881) 7 QBD 456 (refd)
- 3 *Pritchard v Merchant's and Tradesmen's Life Assurance Society* (1858) 3 CBNS 622 (refd)

E

Appeal from: Civil Suit No C287 of 1983 (High Court, Kuala Lumpur)

CK Lee (CK Lee & Associates) for the appellant.

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Chandra Kanagasabai and A Kumar (Hazzan & Fadzil) for the respondent.

Gunn Chit Tuan CJ (Malaya) (delivering the grounds of judgment of the court): Syarikat Pembinaan Lida Sdn Bhd ('the appellant') had appealed against the inadequacy of the sum of RM25,000 awarded to it by the High Court under a fire insurance policy issued by Talasco Insurance Sdn Bhd ('the respondent'). The respondent, in turn, had cross-appealed against the whole of the decision of the High Court including the award of RM25,000 on the ground, inter alia, that it should not have been held liable at all as the insurer. We dismissed the appeal of the appellant and allowed the cross-appeal of the respondent and now give our reasons for our decision.

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The said sum of RM25,000 was awarded in pursuance of the said fire insurance policy issued by the respondent to the appellant to cover damage from fire at Bukit Mertajam in respect of 'building in course of construction' and 'building materials and site office' in connection with the business and work of the appellant as building contractor for a housing developer called Duniaga Sdn Bhd.

I The said fire insurance policy under which the award of RM25,000 was given was a renewal of a similar fire policy which had expired on 31 December 1981. When that policy expired on 31 December 1981, it was not renewed at or before the time of its expiry. Then on 9 February 1982, a fire, which was a risk which would have been covered by the earlier policy

if it had been validly renewed for another year on or before 31 December 1981, occurred causing some damage to the appellant's building materials and site office.

On 10 February 1982, the branch manager of the respondent insurer at Alor Setar, one Abdul Salam bin Pani, issued a cover note to the appellant and premium was then paid on 11 February 1982. It is to be noted that the cover note thus issued in renewal of the earlier policy purported to cover retrospectively the period from 1 January 1982 to 30 June 1982, thus covering the fire and the consequential damage in question retrospectively. The learned judge on the evidence adduced before him came to the finding that, 'On the facts before me, I find that there are ample evidence to show that Salam knew of the fire before he issued the cover note on behalf of Talasco ...'. However, with respect, we found that the learned judge had erred when he also stated that Salam was authorized to issue the cover note to cover the risk and concluded that the respondent was liable on the claim. We agreed with the main thrust of the argument advanced by counsel for the respondent that the learned judge was wrong in law in holding that the respondent was liable under the cover note dated and issued on 10 February 1982, which purported to effect renewal of the earlier policy of insurance which had expired on 31 December 1981, and which cover note on the face of it afforded cover to the appellant from 1 January 1982 to 31 June 1982 although the fire had occurred on 9 February 1982.

It must be noted that at the time of the issue of that cover note, there was already no property to insure nor any policy in force. It must also be remembered that contracts of insurance, like wagering contracts, are aleatory contracts and that being so it is considered by the world that 'betting on a certainty renders the wager invalid'. (See Spencer Bower on *Actionable Non Disclosure* at p 97.)

Policies on insurance against fire are made on the implied condition that the description of the property in the policy is true at the time of the making of the policy (see *Silem v Thornton*¹) and where the policy is retrospective, the duty of disclosure applies not only to such facts as were material at the date from which the policy is to take effect, but also to all facts becoming material down to the actual date on which the contract is made. The position of the case in the present appeal is that there was in fact no property to insure at the date of the issue of the cover note purporting to renew the old fire insurance policy.

Although the subject matter had been destroyed by fire at the date of effecting the purported renewal of the insurance, the contract may nevertheless, in some cases, be valid and operate to indemnify the assured notwithstanding the destruction of the subject matter because there is no objection in principle to a retrospective insurance, provided that the insured had in fact at the date of the loss an insurable interest. As stated by Brett LJ in *Bradford v Symondson*² at p 461, who, after referring to policies on ships, 'lost or not lost' continued, 'indeed the decisions, or at all events the dicta of Lord Mansfield and others of the greatest insurance judges in England, have gone as far as this, that if both parties knew that the subject matter was lost at the time when they entered into the policy, and the policy in terms covers that loss, the policy is good'. Nevertheless it must be *clear* from the

A wording of the policy that such was the intention of the parties; if this cannot be demonstrated the policy is void and the premium must be returned. (*Pritchard v Merchants' and Tradesmen's Life Assurance Society*.³)

B In this case, the appellant had failed to establish the basic fact that the wording of the policy afforded cover for the property concerned which was lost after the expiry of the old policy but prior to the issue of the cover note, assuming it had informed the respondent of the fire prior to the issue of the cover note. As it had failed to do so, the appellant's claim had to be dismissed. The failure of the learned judge to address himself on that basic issue was a misdirection by way of non-direction which had occasioned a miscarriage of justice for, if he had so directed himself, the inevitable conclusion would have been that the terms of that particular policy did not cover a situation where the subject matter may have been destroyed by fire prior to the date of effecting the renewal of the insurance and there was no plea for rectification of the policy. In short, therefore, the respondent, as the insurer, was not liable because the cover note had not attached at all by reason of the fact that at the time of its issue, the risk had determined and there was no insurable interest to insure and the terms of the policy in this case did not cover such a situation.

E For the above reasons, we therefore ordered that the cross-appeal of the respondent be allowed and the appeal of the appellant be dismissed with costs here and below with the deposit in court to be paid out to the respondent on account of taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim

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